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# In the Supreme Court of the United States

OCTOBER TERM, 1973

## No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,

*Appellant,*

*v.*

PAT L. TORNILLO, JR.,

*Appellee.*

**On Appeal From The Supreme Court of Florida**

## BRIEF FOR APPELLANT THE MIAMI HERALD PUBLISHING COMPANY

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February 28, 1974

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**On Appeal From The Supreme Court of Florida**

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# BRIEF FOR APPELLANT THE MIAMI HERALD PUBLISHING COMPANY

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## OPENING STATEMENT

Appellant The Miami Herald Publishing Company, a division of Knight Newspapers, Inc. (*"The Herald"*) appeals from the judgment of the Supreme Court of Florida upholding the constitutionality of Section 104.38, Florida Statutes, a criminal statute enacted in 1913 which requires newspapers to provide free space for political candidates to respond to criticism of their candidacies (Florida's "compulsory publication statute").

## OPINIONS BELOW

The opinion of the Dade County Circuit Court which declared Section 104.38, Florida Statutes, unconstitutional on its face is reported at 38 Fla. Supp. 80 and is reproduced in the Appendix.[1] The initial *per curiam* opinion of the Florida Supreme Court dated July 18, 1973, which reversed the decision of the Circuit Court, and a *per curiam* opinion denying rehearing dated October 10, 1973, are reported at 287 So.2d 78 and are also reproduced in the Appendix.[2]

## JURISDICTION

Claiming a violation of Section 104.38, Florida Statutes, a criminal statute, Appellee Pat L. Tornillo, Jr. ("Tornillo") brought this action as a civil suit seeking

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[1]Appendix ("App.") 11.

[2]App. 15, 39.

to force *The Herald* to print at no cost to Tornillo statements which he had prepared about his political candidacy, and to pay damages for *The Herald's* refusal to do so. The Dade County Circuit Court granted *The Herald's* motion to dismiss the Complaint, holding that the statute on its face violated the First and Fourteenth Amendments to the United States Constitution. Tornillo appealed directly to the Florida Supreme Court. That Court, *per curiam*, reversed the decision of the Dade County Circuit Court, and upheld the constitutionality of the statute. *The Herald* petitioned for a rehearing, which the Florida Supreme Court denied in a second *per curiam* opinion. *The Herald* filed a timely Notice of Appeal to this Court, asserting the Court's jurisdiction under Section 1257(2), Title 28, United States Code, on the basis that the Florida Supreme Court had rendered a final judgment on controlling issues of federal constitutional law. This Court has postponed its final determination on the jurisdictional question.

## QUESTION PRESENTED

Does the Florida compulsory publication statute abridge freedom of speech and the press and deny due process of law in violation of the First and Fourteenth Amendments to the United States Constitution by compelling a newspaper, under threat of criminal sanctions and civil liability, to provide free space for a candidate in an election to reply to any publication in the newspaper which "assails [his] personal character," charges him with "malfeasance or misfeasance in office," or "otherwise attacks his official record"?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution provide in relevant part, respectively:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .", and
>
> ". . . no State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Florida's compulsory publication statute provides:

> "Section 104.38. Newspaper assailing candidate in an election; space for reply. — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

Sections 775.082 and 775.083, Florida Statutes, provide criminal penalties for violations of Section 104.38, and Sections 97.021(1)-(4) and (18) describe the types of elections covered by the law and define the term "candidate."[3]

Wholly apart from the compulsory publication statute, Section 770.02, Florida Statutes, allows an individual who believes himself to have been libeled to request a retraction, and limits recovery for the alleged libel to actual damages where the publisher prints a retraction.[4]

## STATEMENT OF THE CASE

In the fall of 1972, Tornillo was a candidate for the Democratic Party nomination for a seat in the Florida House of Representatives. On September 20, 1972 and September 29, 1972, *The Herald* published editorials relating to Tornillo's candidacy.[5]

On September 27 and 30, 1972, relying on the compulsory publication statute, Tornillo demanded that *The Herald* print verbatim and free of cost statements he had prepared and claimed were replies to the editorials.[6] Tornillo did not claim that the editorials were libelous, untrue, or inaccurate, and he did not request a retraction. Several months before Tornillo's demand, the statute had been declared unconstitutional, and the Florida Attorney General had conceded the invalidity of the statute.[7] *The Herald* did not print the material submitted by Tornillo.

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[3]App. 46.

[4]App. 47.

[5]The editorials are at App. 5 and 8.

[6]Tornillo's prepared statements are set forth at App. 6-7, and 9-10.

[7]*State v. News-Journal*, 36 Fla. Supp. 164 (Volusia County J. Ct., Fla. 1972) App. 51.

On October 1, 1972, Tornillo filed a civil action in Dade County Circuit Court seeking to force *The Herald* to publish his statements, and to obtain damages. An emergency hearing was held on October 2, 1972. The Attorney General was represented at the hearing and advised the Court that he would not defend the constitutionality of the compulsory publication statute.[8]

At the conclusion of the hearing, the Circuit Court ordered Tornillo's case dismissed with prejudice, holding: (i) the statute is void on its face as an impermissible restriction upon freedom of the press in violation of the First and Fourteenth Amendments to the Constitution of the United States, and (ii) the statute's vagueness and ambiguity deny due process of law in violation of the Fourteenth Amendment.

Tornillo appealed the judgment of the Circuit Court directly to the Florida Supreme Court. On July 10, 1973, the Florida Supreme Court *per curiam*, one Justice dissenting, reversed the Circuit Court and upheld the validity of the compulsory publication statute. *The Herald* filed a Petition for Rehearing, which was denied in a *per curiam* opinion dated October 10, 1973, one Justice again dissenting.[9] *The Herald* appealed to this Court.

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[8]Section 86.091, Florida Statutes, requires that the Attorney General be notified of any action in which a statute is alleged to be unconstitutional.

[9]Twenty-eight briefs *amicus curiae* (including that of the Attorney General) urged that the statute be declared unconstitutional, and one brief *amicus curiae* supported the validity of the statute. Copies of all briefs *amicus curiae* which were filed in the Florida Supreme Court are contained in the Record before this Court.

## ARGUMENT

### Introduction and Summary

The Florida statute in question conditions a newspaper's right to publish editorials, news stories, or any other matter criticizing political candidates by requiring that if such matter is printed, the newspaper must provide the candidates free space for a "reply". Violations of the statute are punishable as misdemeanors of the first degree.[10] The Florida Supreme Court held in its opinion below that the statute may also be invoked as the basis for a private action for a mandatory injunction and damages.[11]

The compulsory publication statute lay dormant for 60 years after its enactment in 1913. In its first judicial test in 1972, it was ruled unconstitutional.[12] The Florida statute was likewise declared void by the trial court in this case[13] and the Florida Attorney General refused to support the constitutionality of the statute.[14] Nevertheless, the Florida Supreme Court resurrected the statute and declared that it is not only consistent with the First Amendment,

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[10]Sections 775.082-83 Fla. Stat. provide penalties of up to one year's imprisonment and a fine of up to $1,000 for first degree misdemeanors. App. 48-49.

[11]267 So.2d at 79-80; App. 16-17.

[12]*State v. News-Journal, supra.*

[13]38 Fla. Supp. at 82; App. 12.

[14]38 Fla. Supp. at 83; App. 14. The Attorney General filed a brief *amicus curiae* in the Florida Supreme Court urging affirmance of the Circuit Court's decision. That brief is contained in the Record before this Court.

but that it enhances freedom of speech and press. The Court also held: (a) the statute is a permissible regulation of the press because of the state's interest in fair elections; (b) the alleged ownership concentration of the press requires a right of access to ensure that all opinions will be expressed; (c) the press may be subjected to the same type of regulation as the broadcast media. There is no legal precedent for any of these novel theories; on the contrary, all judicial authority squarely opposes each contention.

The Florida compulsory publication statute is void on its face because it imposes governmental controls on editorial decisions to publish any matter critical of political candidates. Governmental regulation of the content of newspapers by requiring publication is no less an unconstitutional restraint than governmental prohibition upon publication. Governmental control of newspapers for the alleged purpose of promoting "fairness" is censorship. As such, it is the exact opposite of the freedom of speech and press guaranteed by the First Amendment.

The "fairness doctrine" applicable to the broadcast media may not be constitutionally applied to newspapers. The validity of the fairness doctrine rests solely on the unique technological limitations inherent in broadcast media.

The Florida statute's direct intrusion upon freedom of the press may not be justified by the state's interest in "fair" elections, or by any other asserted state interest. Alleged economic concentration in the media cannot justify abridgement of First Amendment freedoms.

The effect of the statute, if upheld by this Court, will be to suppress rather than enhance public debate. Printing replies in compliance with the statute will force newspapers to surrender their editorial freedom and impose substantial economic burdens. To avoid this compulsion, newspapers will restrict or eliminate publication of criticism and comment on political candidates.

In addition to its direct infringement upon First Amendment rights, the Florida criminal statute at issue in this case denies due process guaranteed by the Fourteenth Amendment, because the statute is excessively broad, vague, and ambiguous. The Florida Supreme Court attempted to cure through interpretation some of the more obvious of these defects in the statute, but the effort simply revealed more clearly the unconstitutional deficiencies which permeate the statute.

The Florida Supreme Court has conclusively determined the constitutional issues presented by this case. The decision below is "final" for purposes of Section 1257 (2), Title 28, United States Code.

**A. The Florida compulsory publication statute is void on its face because it seeks to regulate the content of newspapers in violation of the First Amendment's guarantees of free speech and press.**

1. *The Florida statute's requirement to print is equivalent to censorship.*

The Florida compulsory publication statute violates the First Amendment because it substitutes governmental fiat for editorial freedom. "For better or worse, editing is what editors are for; and editing is selection and choice of material."[15]

Governmental compulsion to print is in direct contradiction to freedom of the press. "[T]he determination of what news is — the selectivity of the press — lies close to the heart of a press that may speak, or not speak, as it sees fit."[16]

Forced publication is a form of regulation as pernicious as direct censorship. As the trial court held in declaring the Florida statute unconstitutional, "clearly if the State may not prohibit what a newspaper may print it cannot assume the editorial function and direct a newspaper what to print."[17] Professor Chafee warned: "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper."[18]

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[15]*Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 36 L.Ed.2d 772, 796 (1973).

[16]*Cook v. Advertiser Company*, 458 F.2d 1119, 1123 (5th Cir. 1972) (Judge Wisdom, concurring.)

[17]38 Fla. Supp. at 82; App. 13.

[18]II Chafee, Government and Mass Communications 633 (1947).

Under the compulsory publication statute, any criticism in news stories, editorials, and commentaries of a newspaper which "assails" a political candidate, charges him "with malfeasance or misfeasance," or "otherwise attacks his official record" triggers the right of free space for a reply. It is irrelevant to the operation of the statute whether the critical story or column was written by the newspaper itself or appears as the result of an editorial decision to print a syndicated column or story from the wire services. More importantly, the statute allows no exception for publications which are true and non-libelous. Once material critical of a candidate is published, the statute, by its terms, leaves the newspaper with absolutely no choice: it must publish verbatim a "reply" or face criminal sanctions.

The Florida Supreme Court theorized that the compulsory publication statute "does not constitute an incursion upon First Amendment rights or a prior restraint, since no *specified newspaper content is excluded.*"[19] That theory is untenable. "There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material."[20]

The general thrust of the Florida Supreme Court's opinion appears to be that governmental regulation of the content of newspapers is required to ensure that all voices who want to speak out have access to newspapers so that the people may have the fullest flow of information. The

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[19] 287 So.2d at 82; App. 22

[20] *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971).

Florida Supreme Court insists that the statute enhances rather than diminishes First Amendment values by providing the newspaper reader with "the whole story, rather than half of it . . ."[21] Governmental efforts to impede and restrict criticism by the press are invariably couched in terms of achieving some worthy social goal at the cost of only minor restrictions upon freedom of the press. "There is never a paucity of arguments in favor of limiting the freedom of the press."[22]

The theory adopted by the Florida Supreme Court that greater freedom of expression can be obtained through governmental regulation of the press conflicts directly with the language and spirit of the First Amendment.[23] The First Amendment promotes full discussion of issues and robust debate, but not by regulating the fairness or balance of any individual element of the press, and not by

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[21]287 So.2d at 87; App. 33.

[22]*Columbia Broadcasting System v. Democratic National Committee*, *supra* at 807-808 (Mr. Justice Stewart, concurring.) Muzzling the critical voice of the press has been attempted, for example, in the name of fair elections, *Mills v. Alabama*, 384 U.S. 214 (1966); protection of personal reputation, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); community morality, *Winters v. New York*, 333 U.S. 507 (1948); combatting racial discrimination in housing, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); and national security, *New York Times Co. v. United States*, 403 U.S. 713 (1971). Each of these efforts was rejected by the Court.

[23]Judge Bazelon has written: "To argue that a more effective press requires a more regulated press flies in the face of what history has taught us about the values and purposes of protecting the individual's freedom of speech." *Brandywine-Main Line Radio, Inc. v. F.C.C.*, 473 F.2d 16, 79 (D.C. Cir. 1972) (dissenting opinion).

guaranteeing every individual access to any forum he desires. This basic principle was reiterated by the Court last term in *Columbia Broadcasting*. In rejecting a general claim of private access rights to the broadcast media, the Chief Justice's opinion for the Court analyzed the limited scope of the regulation of broadcast media permitted by the First Amendment, and distinguished the freedom accorded newspapers. The First Amendment gives newspapers freedom to advocate their own views, undeterred by any requirement to meet a governmentally imposed standard of "fairness".

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence advertisers — to assure financial success; and, second, the journalistic integrity of its editors and publishers."[24]

The concurring opinion of Mr. Justice Douglas reemphasized the First Amendment's prohibition of any governmental interference with the editorial discretion of the press.

> "It would come as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide 'guidelines' for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all issues was made.
>
> • • •

[24] 36 L.Ed.2d at 792.

> "Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the government is the censor, administrative fiat not freedom of choice carries the day."[25]

Mr. Justice Stewart's concurring opinion summarized the essence of freedom of the press as follows: "[T]he First Amendment's guarantee of a free press . . . gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government."[26]

Other recent decisions of this Court have emphasized that no governmental mandate to print can be consistent with the First Amendment. In *Branzburg v. Hayes*,[27] the Court noted carefully that the case involved "no prior restraint or restriction on what the press may publish and no express or implied command that the press publish what it prefers to withhold."[28] Similarly, in *Pittsburgh Press Co. v. Human Rela. Comm.*,[29] the Court stated that its decision did not

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[25]36 L.Ed.2d at 811, 812.

[26]36 L.Ed.2d at 808. The dissenting opinion of Mr. Justice Brennan, in which Mr. Justice Marshall joined, indicated his agreement with the majority of the Court as to the unconstitutionality of any attempt to regulate the content of newspapers. "[S]uch regulation of newspaper would be impossible. . . ." *Id* at 829 n. 12.

[27]408 U.S. 665 (1972).

[28]*Id.* at 681.

[29]37 L.Ed.2d 669 (1973).

> "authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."[30]

The theory adopted by the Florida Supreme Court that the First Amendment permits governmental regulation to compel a newspaper to publish against its will has been uniformly rejected by all other courts which have considered the issue, including three Circuit Courts of Appeal, several District Courts, and the Supreme Judicial Court of Massachusetts. This line of authority was ignored by the Florida Supreme Court.

In *Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.*,[31] a newspaper refused to publish advertisements submitted to it by a labor union, which presented the union's views on a pending labor dispute. The Seventh Circuit held that an attempt to compel publication would violate the First Amendment:

> "It is urged that the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements tendered to it for publication at its established rates. We do not understand this

[30] *Id.* at 680.

[31] 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

> to be the concept of freedom of the press recognized in the First Amendment. The First Amendment guarantees of free expression, oral or printed, exist for all . . . . The Union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent."[32]

The constitutional issues involved in an attempt to compel a newspaper to publish were also squarely faced by the Ninth Circuit in *Associates & Aldrich Co. v. Times Mirror Co.*[33] The Court there upheld a newspaper's refusal to accept certain proffered advertising without modifications requested by the newspaper. "Appellant has not convinced us that the Courts or any other governmental agency should dictate the contents of a newspaper."[34]

A similar result was reached by the Third Circuit in *Avins v. Rutgers, State University of New Jersey*,[35] where the plaintiff sought to compel the Rutgers Law Review to publish an article which its editors had previously rejected. The Court refused to compel publication, holding that the would-be journalist did "not have the right, constitutional or otherwise, to commandeer the press and columns of the Rutgers Law Review . . . to the exclusion of other articles deemed by the editors to be more suitable for publication."[36]

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[32] *Id.* at 478.

[33] 440 F.2d 133 (9th Cir. 1971).

[34] *Id.* at 135 (footnote om.).

[35] 385 F.2d 151 (3rd Cir. 1967).

[36] *Id.* at 153.

A three-judge District Court in *Resident Participation of Denver, Inc. v. Love*,[37] also resisted arguments for revising the First Amendment to allow the government to compel publication:

> "We are aware that lack of access to those media which reach large audiences has, some believe, given birth to a frustration which compels otherwise peaceful citizens to engage in violence to get their view to the nation. A cause of this frustration, one critic maintains, is that, although the courts have been vigorous in protecting free speech, they have been indifferent to creating opportunities for expression. Barron, Access to the Press — A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967). We note, however, that while Professor Barron spends considerable space exploring a statutory solution to this problem, he devotes much less attention to constitutional arguments and but one paragraph to the problem of state action, which we find insurmountable. Professor Barron simply concludes without noticeable explanation, that newspapers can be subjected to the 'constitutional restrictions which quasi-public status invites.' *Id.* at 1669. As desirable as this result might be, we are unable in good faith to reach it."[38]

Likewise, in *Brown v. Murphy*[39] and *Yablonski v.*

[37] 322 F.Supp. 1100 (D. Col. 1971).

[38] *Id.* at 1105.

[39] 355 F.Supp. 416, 417 (S.D.N.Y. 1973) (". . . courts or other governmental agencies should not encroach upon freedom of the press by dictating the contents of private publications.")

*United Mine Workers of America*,[40] District Courts held that compulsory publication was prohibited by the First Amendment. The same conclusion was reached by the Supreme Judicial Court of Massachusetts in declaring unconstitutional a proposed statute which would have required newspapers to publish political advertising.[41]

Each of the cases discussed above involved a claim that the Courts should compel access to the press in order to enhance First Amendment values. In this case, the Florida legislature has mandated a similar compulsory publication. Whether governmental compulsion is by court decree,[42] or by statute,[43] is constitutionally irrelevant. As all decisions prior to that of the Florida Supreme Court unanimously held, the First Amendment forbids *any* governmental regulation of the content of a newspaper.

Pointedly ignoring the uniform direct precedents, the Florida Supreme Court claimed support for its contrary

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[40]305 F.Supp. 868, 872 (D.D.C. 1969) (to "require defendants to print certain material supplied by plaintiff . . . would be a clear violation of the First Amendment . . . .")

[41]*Opinion of the Justices*, 298 N.E.2d 829 (Mass. 1973)

Without resort to constitutional grounds, numerous other cases have held that a newspaper is not a "public utility" compelled to accept and publish all advertising proffered to it. *E.g.*, *McGill v. State*, 209 Ga. 500, 74 S.E.2d 78, 81-82 (1953); *Chronicle & Gazette Pub. Co., Inc. v. Attorney General*, 94 N.H. 148, 48 A.2d 478, 482 (1946), *appeal dismissed*, 329 U.S. 690 (1947); *Shuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1933); *In re Louis Wohl*, 50 F.2d 254, 255 (E.D. Mich. 1931); *Friedenburg v. Times Pub. Co.*, 170 La. 3, 127 So. 345 (1930); *Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 131 N.Y.S.2d 515 (1954); *see Associated Press v. U.S.*, 326 U.S. 1, 19 (1945).

[42]*E.g.*, *Chicago Joint Board, Amal. Cloth. Workers* v. *Chicago Tribune Co.*, *supra.*

[43]*Opinion of the Justices*, *supra.*

view from a footnote in the plurality opinion of Mr. Justice Brennan in *Rosenbloom v. Metromedia.*[44] This note plainly does not support the constitutionality of the compulsory publication statute at issue in this case.

Mr. Justice Brennan's opinion in *Rosenbloom* concluded that the privilege originally held applicable to libel actions by public officials in *New York Times Co. v. Sullivan*[45] should be extended to cover all matters of public concern. In answering an argument that persons involved in matters of public concern might not have as much access as public officials to public media for purposes of responding to defamation, Mr. Justice Brennan made the footnote

[44]403 U.S. 29 (1971). In the footnote, Mr. Justice Brennan stated:

"Some States have adopted retraction statutes or right-of-reply statutes. See Donnelly, The Right of Reply: An Alternative to an Action for Libel, 34 Va. L.Rev. 867 (1948); Note, Vindication of the Reputation of a Public Official, 80 Harv. L.Rev. 1730 (1967). Cf. *Red Lion Broadcasting Co., v. FCC*, 395 U.S. 367 (1969).

'One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, Access to the Press — A New First Amendment Right, 80 Harv. L.Rev. 1641, 1666-1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly.'" 403 U.S. at 47 n. 15

Contrary to the characterization in the opinion of the Florida Supreme Court, there was no majority opinion in *Rosenbloom.*

[45]376 U.S. 254 (1964).

observation that "some states have adopted retraction statutes or right of reply statutes." Mr. Justice Brennan's dictum is plainly not a blanket approval of the constitutionality of all statutes which purport to create a right of "reply." The law review articles cited by Mr. Justice Brennan discuss a right of "reply" concept solely in the context of libelous and inaccurate publications. Permissive right of "reply" statutes are suggested, for example, as an alternative to retraction statutes as a basis for barring recovery of punitive damages for libel against a newspaper which chooses to publish such a reply. The footnote lends no support to the Florida statute, which is not restricted to libel, but also applies to any criticism of political candidates, and which is compulsory under threat of criminal sanction.

2. *The "fairness doctrine" is not constitutionally applicable to newspapers.*

In upholding the constitutionality of the compulsory publication statute, the Florida Supreme Court relied heavily upon the decision of this Court in *Red Lion Broadcasting Co. v. F.C.C.*,[46] which sustained the constitutionality of the "fairness doctrine" and corollary regulations such as the "personal attack rules" which have been imposed upon broadcast media (radio and television) by the Federal Communications Commission. In disregard of the careful distinction established by this Court between broadcast media and the printed press, the Florida Supreme Court asserted that *Red Lion* sets forth guidelines which are generally applicable to both.[47] In

[46]395 U.S. 367 (1969).

[47]*E.g.*, 287 So.2d at 83-84, 87; App. 24-25, 32.

addition, the state court contended the fairness doctrine may be made directly applicable to newspapers because the press uses telecommunications in its operations.

> "Newspapers are not wholly dependent on electronic media as were the broadcasters in *Red Lion Broadcasting Co. v. F.C.C., supra.* However, we have no difficulty in taking judicial notice that the publishers of newspapers in this contemporary era would perish without this vital source of communications. The dissemination of news other than purely local is transmitted over telegraph wires or over air waves. This not only includes dissemination of news but also in chain newspapers operations so prevalent today, the Miami Herald being one; even editorials are prepared in one place and transmitted electronically to another. Therefore, the principles of law enunciated in *Red Lion Broadcasting Co. v. F.C.C., supra,* have been taken into consideration in reaching our opinion."[48]

In seeking to extend the fairness doctrine to the printed press, the Florida Supreme Court ignored the repeated statements of this Court in *Red Lion* itself, and subsequently in *Columbia Broadcasting*, that the fairness doctrine is a narrow exception to general First Amendment principles, applicable solely to broadcast media, and explicitly inapplicable to the press. The constitutionality of the "fairness doctrine" has been sustained by this Court solely on the basis of the unique technological limitations upon the availability of the broadcast media. Then Circuit

[48] 287 So.2d at 86-87; App. 32.

Judge Burger emphasized the distinctions between newspapers and the broadcast media in *Office of Communication of United Church of Christ v. F.C.C.*:

> "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot."[49]

This distinction was repeated by Chief Justice Burger at the outset of the *Columbia Broadcasting* decision:

> "[T]he broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants.... The Court spoke to this reality when, in Red Lion, we said 'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.' Red Lion, supra, 395 U.S., at 388, 23 L.Ed. 2d 371."[50]

*Columbia Broadcasting* resolved any doubt that *Red Lion* could be read to mandate regulation of the content of newspapers. *Columbia Broadcasting* held that a broadcaster may not be forced to accept paid political advertis-

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[49]359 F.2d 994, 1003 (D.C. Cir. 1966).

[50]36 L.Ed.2d at 783.

ing, because governmental intrusion upon the exercise of "journalistic discretion" to determine what should or should not be broadcast contravenes the "rigid limitations" of the First Amendment. The Court denied any general right of private access to the broadcast media:

> "To agree that debate on public issues should be 'robust, and wide-open' does not mean that we should exchange 'public trustee' broadcasting, with all its limitations, for a system of self-appointed editorial commentators."[51]

The Florida Supreme Court, after the assertion by Justice Roberts[52] that *Columbia Broadcasting* is "not applicable" to the Florida compulsory publication statute because of the distinction between broadcast media and newspapers, reached the astonishing conclusion that newspapers may be subjected to greater governmental control than *Columbia Broadcasting* would permit as to broadcasters.

*Columbia Broadcasting* held that broadcasters cannot constitutionally be compelled to abdicate editorial discretion and accept material for broadcast against their will. *A fortiori*, newspapers, with a greater range of discretion, cannot be subjected to a compulsory publication rule. Every opinion in *Columbia Broadcasting* noted that whatever regulation might constitutionally be applied to the broadcast media, no regulation of the content of newspapers was permissible.

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[51]36 L.Ed.2d at 796.

[52]*Columbia Broadcasting* was cited only in Mr. Justice Robert's concurring opinion, joined by five other Justices, not in the Court's *per curiam* opinion. 287 So. 2d at 87-88; App. 33-36.

### 3. *There is no compelling state interest to justify upholding the Florida statute.*

The Florida Supreme Court asserted that even if the compulsory publication statute abridged freedom of the press, there were two specific grounds for upholding the constitutionality of the statute: the interests of the state in ensuring fair elections and in preventing monopolistic abuses arising from alleged concentration of the media. Neither ground affords any basis for sustaining the constitutionality of the statute's undeniable direct regulation of the content of newspapers.

#### a. The state's interest in ensuring fair elections is insufficient justification.

The Florida Supreme Court's contention that the compulsory publication statute can be justified by the legislative purpose of ensuring fair elections directly contradicts this Court's express holding in *Mills v. Alabama*.[53] In *Mills*, a newspaper editor was indicted for publishing an editorial in violation of an Alabama statute which made it a crime to publish on election day matter which was designed to influence the election. The Alabama Supreme Court held that the statute's restrictions upon free speech and press were a valid exercise of the state's police powers, because it protected the public from last minute charges on election day to which the other side had no time to reply.

This Court held that the state's argument for upholding the statute had a "fatal flaw," and that:

[53] 384 U.S. 214 (1966).

> "no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election."[54]

On the same ground, a three-judge District Court in *American Civil Liberties Union, Inc. v. Jennings*,[55] held Title I of the Federal Election Campaign Act of 1971[56] violative of the First Amendment, because it forbids newspapers from publishing political advertising without obtaining assurances that the advertising complies with that Act. The Court held that the legislative purpose of enhancing the fairness of elections could not justify the statute's infringement on freedom of the press. "The fact that restrictions have been imposed in furtherance of matters of legitimate governmental concern is neither dispositive nor, in this instance, persuasive."[57]

The Florida Supreme Court's argument that the Florida statute is essential (or even useful) to fair elections is belied by the fact that it was forgotten as soon as it was enacted in 1913.[58] Likewise, there can be no contention that

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[54]384 U.S. at 220.

[55]366 F.Supp. 1041 (D.D.C. 1973).

[56]47 U.S.C.A. Sections 801, et seq.

[57]366 F.Supp. at 1051.

[58]It seems equally likely that the primary purpose of the Florida statute was to protect incumbents, who are the only political candidates able to invoke the statute on the grounds of a charge of "malfeasance or misfeasance" in office, or an attack on their "official record."

in the only two other states which have ever enacted compulsory publication statutes, elections were in any way more fair or informed as a result of those statutes.[59]

There is no precedent to indicate that unbridled circulation of a candidate's campaign rhetoric would contribute in any measurable way to a "fair" election. As discussed in Section 4, *infra*, the effect of the statute, if upheld by this Court, will be to decrease, not increase, the flow of meaningful public information during elections.

**b. Alleged concentration in the media is insufficient justification.**

The Florida Supreme Court insists alternatively that governmentally compelled publication is constitutionally permissible because of alleged economic concentration in the media.[60]

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[59]Miss. Code Ann. §3175 (1942); Nev. Rev. Stat. §200.570 (1963). The Mississippi statute was made into a typical libel statute in *Manasco v. Walley*, 63 So.2d 91 (Miss. 1953), which held that the statute could be invoked only if the publication concerning the candidate was libelous. Nevada repealed its mandatory "right of reply" statute in 1969 and replaced it with a typical libel retraction statute. Ch. 310, Laws of Nevada, Fifty-fifth Session (Act of April 14, 1969).

[60]"The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication, acquisition of radio and television stations, and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations

Assuming, *arguendo*, the existence of economic concentration in the media, this assumption can provide no justification for the Florida statute's direct intrusion upon First Amendment rights. The anti-trust laws are adequate to deal with such problems, if they are found to exist in fact. This Court held in *Associated Press v. United States*,[61] that the First Amendment does not shield the press from violations of the federal anti-trust law. However, the Florida Supreme Court ignored this Court's careful distinction that its decision did not permit regulation of the content of the news.

> "The decree does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published."[62]

The Florida Supreme Court cited *Associated Press* for its proposition that the forced publication statute is constitutional. But *Associated Press* stands for exactly the opposite conclusion, showing that alleged monopolization may not be cured by abridging the First Amendment, but only by application of the anti-trust laws.

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are acquiring monopolistic influence over huge areas of the country. We take note of a recent article in Florida Trend magazine, March 1973, explicating that the Miami Herald is the largest newspaper published in Florida, that it is larger in size than the next two largest newspapers; and that it is not only a large city daily newspaper but also is a regional and international newspaper." 287 So.2d at 82-83; App. 22-23. The sole basis for the Court's allegations of media concentration and monopolistic tendencies was the magazine article referred to above. There was nothing in the record before the Florida Supreme Court which evidenced the alleged concentration.

[61] 326 U.S. 1 (1945).

[62] *Id.* at 20 n. 18.

In contrast to the holding of the Florida Supreme Court, the Supreme Judicial Court of Massachusetts ruled last year in an advisory opinion to the Massachusetts Legislature that a proposed statute which sought to compel publication of political advertising would be unconstitutional, despite claims that the statute was needed to deal with alleged monopolization in the media.

> "The situation at which [the proposed statute] is directed may be the 'monopolistic' status of certain news publications. However, compulsion to publish all responsive political advertisements, applicable to all newspapers and other publications of general circulation in the Commonwealth, goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be published. See Barron, Access to the Press—A New First Amendment Right, 80 Harv.L.Rev. 1641, 1676-1678. Indeed no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement. The views expressed and implied in the opinion of the court and in the dissenting opinions in the *Pittsburgh Press Co.* case, *supra*, create substantial doubt that such legislation would pass constitutional muster."[63]

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[63] *Opinion of the Justices*, *supra* at 835 (footnote om.).

The separate opinion of Mr. Justice Douglas in *Columbia Broadcasting* also recognized and disposed of the contention that alleged concentration in the media can be cured by government regulation of the content of the press:

> "Thomas I. Emerson, our leading First Amendment scholar has stated that
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> '. . . any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all "newsworthy" events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity.' The System of Freedom of Expression (1970), p. 671."[64]

4. *The Florida statute, if upheld, will suppress public debate.*

It is clear from the statements of the *amici curiae* before this Court and the Florida Supreme Court that the compulsory publication law will seriously inhibit free discussion and criticism of political candidates.[65] The statute "dampens the vigor and limits the variety of public debate."[66]

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[64]36 L.Ed.2d at 811.

[65]See, for example, the following briefs *amicus curiae* filed in this Court: Brief for Chicago Tribune Company at 10-11; Brief for Reporters Committee for Freedom of the Press Legal Defense and Research Fund at 19; Brief for Washington Post Company at 10; Brief of The Times Mirror Company at 14; and see, for example, the following briefs *amicus curiae* filed in the Florida Supreme Court: Brief of The Tallahassee Democrat at 2-4; Brief of The Sun-Journal at 2-4.

[66]*New York Times Co. v. Sullivan, supra* at 279.

Compliance with the statute would interfere with virtually every aspect of newspaper publication.[67] Speeches of political candidates, which invariably contain direct or oblique criticism of opponents, could not be reported without assuming an obligation to print a "reply" by the opponent. Syndicated columns critical of political candidates could not be published without the assumption of an obligation for "replies" from those criticized. Editorial endorsements of candidates could not be made without creating a duty to publish a "reply" written by other candidates. Political advertising of political candidates which comments adversely on opponents or criticism of the public record of incumbents could not be accepted without generating an obligation to print a free response. Where multiple candidates seek a political office, multiple responses, and perhaps even round-robin responses, could be anticipated.

To comply with the statute would force newspapers printing criticism of political candidates to become bulletin boards for an endless stream of self-serving political propaganda. Since all publication compelled by the Florida statute would be made at the newspaper's expense, the resulting financial burden would be substantial.

The requirement to subsidize political candidates would, ironically, fall heaviest upon those newspapers which exercise the greatest degree of civic responsibility by extensively covering political campaigns. While the impact would be severe even on large metropolitan news-

[67]The adverse effect of the statute upon the publication of a newspaper is greatly exacerbated by the vagueness and ambiguity of the statute's terms, as discussed in Section B, *infra*.

papers, an even more substantial, perhaps fatal, effect would be felt by small newspapers.[68]

To minimize the extent to which they would be forced to yield their editorial discretion, as well as to avoid the consequent practical and economic burdens, most newspapers would undoubtedly seek to restrict the amount of political criticism which they publish.[69] Some newspapers might totally abandon publication of any matter which could conceivably trigger the statute. The tendency will be, at least, "To make statements which 'steer far wider of the unlawful zone.' "[70] Publications with a distinct political viewpoint which were formed for the primary purpose of engaging in sharp criticism of political candidates of opposing political persuasion would be eliminated.

Mr. Justice Douglas recognized in his concurring opinion in *Columbia Broadcasting*,

> "The monetary and other burdens imposed on the press by the right of a criticized person to reply, like the traditional damage remedy for libel, lead of course to self-censorship respecting matters of importance to the public that the First

[68] *See e.g.*, Lange, "The Role of Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment," 52 *N.C. L.Rev.* 1, 70 (Nov. 1973).

The financial impact of compliance with the compulsory publication law raises serious questions of taking private property without compensation in violation of the Fourteenth Amendment. *See, e.g., Pennsylvania Coal Co. v. Malion*, 260 U.S. 393 (1922). The expense of forced publication of replies likewise would amount to an unconstitutional tax. *Cf. Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

[69] Lange, *supra* at 71.

[70] *New York Times v. Sullivan, supra* at 279.

Amendment denies the Government the power to impose."[71]

The Supreme Judicial Court of Massachusetts reached the same conclusion in ruling unconstitutional a proposed statute which would have required newspapers to print paid political advertisements. The Court held that the proposed statute would create a paradox, because "instead of achieving a fairer dissemination of political advertising," it might have the opposite result of producing a "chilling effect of discouraging newspapers and other affected publications from accepting any political advertisements." The Court recognized that "A newspaper or other publication of general circulation may decide to publish no political advertisements on an election issue rather than expose itself to a commitment to publish all responsive advertisements."[72]

The impact of upholding the constitutionality of the compulsory publication law would not be confined only to political campaigns in Florida.[73] If this statute can be sustained, it requires little imagination to forsee the extension of the statute to cover criticism of public officials, and ultimately to criticism or comment of any person on any subject. If the government can regulate the content of the newspapers, it is difficult to perceive any remaining objection to licensing of the press, and total governmental control of the content of all newspapers. "It is a frightening specter."[74]

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[71] 36 L.Ed.2d at 821, n. 18.

[72] *Opinion of the Justices, supra* at 833-4.

[73] The statute presumably applies to newspapers published outside Florida which circulate in that state.

[74] *Columbia Broadcasting System v. F.C.C., supra* at 801 (Mr. Justice Stewart concurring).

## B. The Florida statute is void for vagueness.

The opinion of the trial court in this case specifically held Florida's compulsory publication statute:

> "impermissibly vague . . . [since] no editor could know from the statute exactly what words would offend the statute. . . . A state may not enact such a broad statute and leave it to the courts, on a case by case basis, to determine the constitutionality of its application to various circumstances. . . ."[75]

This analysis concisely summarizes the circumstances in which this Court has long applied the due process guarantees of the Fourteenth Amendment to protect First Amendment rights.[76]

The present case presents a classic situation for invoking the judicial remedy of voiding, rather than construing, statutes which "chill" First Amendment liberties, because the statute requires individuals to guess the scope of permissible conduct at their peril.[77] The Florida Supreme Court tried to resolve constitutional problems in the compulsory publication statute by interpretation rather than

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[75]38 Fla. Supp. at 80; App. 13.

[76]Note, *The Void-for-Vagueness Doctrine in the Supreme Court—A Means to an End*, 109 U. Pa. L.Rev. 67 (1960) (prepared by Anthony Amsterdam).

[77]This Court has held that a statute chilling free press rights is impermissibly vague if "an honest distributor of publications could [not] know when he might be held to have ignored [its] prohibition." *Winters v. New York*, 333 U.S. 507, 520 (1948).

by invalidation.[78] This Court has said, however, that statutes affecting First Amendment rights are not so easily rewritten. Judicial construction is not acceptable in the face of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ."[79] Invalidation in such cases is the only recourse.

> "It is settled that a statute, so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment."[80]

On the basis of these established principles Florida's compulsory publication statute requires voiding, not re-writing. The statute is replete with vagueness and ambiguity. Among the principal questions raised by the statute are the following:

(i) Does the term "newspaper" include any printed publication, such as magazines, newsletters, pamphlets, brochures and handbills? Does it include "newspapers" published in other states but circulated in Florida?

(ii) Does the term "columns" include editorials, signed columns, news articles and letters to the editor?

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[78] 287 So.2d at 85; App. 28. Not one of the authorities relied upon by the Florida Court for its application of this principle involved First Amendment rights.

[79] *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

[80] *Winters v. New York, supra* at 509.

Does the term include advertisements? Cartoons? Does the term include statements published pursuant to the compulsory publication statute?

(iii) What constitutes assailing the "personal character" of a political candidate or an "attack" upon his official record? Do these terms encompass mere criticism, no matter how truthful or valid? Do they apply equally to factual statements and expressions of opinion? Does "personal character" include any individual human quality?[21] Was the decision of the Florida Supreme Court below an "official record" of the elected justices comprising the majority?

(iv) Need a "candidate" be mentioned specifically by name to be entitled to compel publication of a reply, or does a reply right arise if a "candidate" can be identified in a publication, even though not named? If a publication refers to a group, does each member of the group have a right to reply?

(v) What is an equally "conspicuous" place for publication of a reply? Is page four of a newspaper as conspicuous as page five?

(vi) How lengthy a reply may be made? If a newspaper editorial states only, "John Doe is not fit for office," what is the length of the permitted reply? Seven words? Can a statute providing such a "reply" be seriously considered as enhancing public discussion?

The Florida Supreme Court recognized the ambiguity in the statute and sought to resolve it by construing "any

[21]The Florida Supreme Court characterized *The Herald* editorials upon which Tornillo based his suit as "attacking" his personal character, 287 So.2d at 79; App. 33, although they can fairly be read as dealing with Tornillo's fitness for office.

reply" to mean only a "wholly responsive reply" which is "neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." The Court sought to avoid the presumption of invalidity applicable to criminal laws affecting the First Amendment rights by holding that only civil remedies were being sought under the criminal statute and if the statute was insufficiently precise as a criminal statute, its criminal penalties could be "easily severed", leaving a valid implied right of civil action based upon the void criminal statute.

The Florida Supreme Court failed to resolve any of the real constitutional concerns posed by the statute. The vagueness of the statute's initial applicability, as contained in such statutory terms as "in its columns", "assails [a candidate's] personal character," and "otherwise attacks his official record," is matched by the residual ambiguity of the Florida Supreme Court's effort to define the statute's terms. Both the statute written by the Legislature and the statute re-written by the Florida Supreme Court impose pre-publication, chilling perils on the editing process. Even so basic a question as the law's scope of coverage (the statute applies to any "newspaper") requires a perilous pre-publication judgment. Even if the statute's criminal penalties were eliminated, its constitutional deficiencies world remain. Tornillo seeks compensatory and punitive damages.[32] "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."[33]

In short, all of the vagueness which leaves the exercise of free expression in doubt still lurks in Florida's judicially-amended, compulsory publication statute.

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[32] 287 So.2d at 79; App. 16.

[33] *New York Times Co. v. Sullivan, supra* at 277.

> "It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."[84]

Under these circumstances, this Court has repeatedly acted to preserve the buffer zone surrounding First Amendment guarantees by applying the doctrine of "void for vagueness." *E.g., Smith v. California*, 361 U.S. 147 (1959); *Watkins v. U.S.*, 354 U.S. 178 (1957); *Winters v. New York*, 333 U.S. 507 (1948); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

### C. The Court has jurisdiction to hear this appeal.

In response to *The Herald's* Jurisdictional Statement, Tornillo raised a question whether the decision of the Florida Supreme Court is technically final for purposes of 28 U.S.C. Section 1257(2).[85] Tornillo concedes, as he must, that the Florida Supreme Court has ruled squarely on the controlling constitutional issues, that the decision is binding on the trial court and all other courts in Florida, and that the constitutional issues are substantial. Nonetheless, Tor-

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[84] *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961), citing *Champlin Ref. Co. v. Corp. Comm'n of Oklahoma*, 286 U.S. 210, 243.

[85] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

nillo suggests a lack of finality because the Florida Supreme Court remanded for "further proceedings not inconsistent with its opinion".[86] Tornillo suggests that unless *The Herald* abandons any non-constitutional defenses it may have, his controversy with *The Herald* may not be ended for purposes of Section 1257[87] and Supreme Court review is consequently barred.

Tornillo misconceives the meaning of finality. In *Mills v. Alabama, supra*, this Court held that a decision of the Alabama Supreme Court was final even though the case was similarly remanded by the state court for further proceedings not inconsistent with its opinion. As in this case, it was argued in *Mills* that the appeal should be dismissed because a trial would be required to determine facts sufficient to constitute a violation of Alabama's criminal anti-publication law. Notwithstanding that the Alabama Supreme Court's decision "did not literally end the case",[88] the Court did not find an absence of requisite finality.[89]

[86]287 So.2d at 87; App. 33.

[87]Tornillo does concede that the case will have been concluded if *The Herald* prevails in this Court. 38 Fla. Supp. 83; App. 14. Only if the Florida Supreme Court's opinion is sustained on constitutional grounds can there be a need to return to the trial court for a determination of factual and state law issues.

[88]384 U.S. at 217.

[89]Although the newspaper editor there agreed to waive constitutional defenses, the Court did not require that waiver as a *sine qua non* to finality. "Indeed, even had appellant been unwilling to concede that he has no defense — apart from the constitutional question — to the charges against him, we would be warranted in reviewing this case. That result follows *a fortiori* from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution." 384 U.S. at 221 (Mr. Justice Douglas, concurring).

Similarly, in *Hudson Distributors, Inc. v. Eli Lilly & Co.*,[90] the Court reviewed a decision of the Ohio Supreme Court which had upheld the constitutionality of that state's fair trade statute and had remanded the case for further proceedings with respect to issues of fact and state law. Although there remained for adjudication purely state law issues, the Court concluded that the only issue presented to it for determination—the constitutionality of the fair trade act—was "final" within the meaning of Section 1257.

> "The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein . . . does not render the judgment of the Ohio Supreme Court on the issue here considered and decided non-final or unappealable. . . ."[91]

This Court has consistently found requisite finality whenever constitutional questions have been conclusively determined at the state level and the remaining non-constitutional issues are unrelated to the issue before the Court. Such results are firmly grounded in the policy underlying Section 1257. The test of finality is intended to facilitate "the smooth working of our federal system,"[92] and to assure that in cases such as this, where no factual or legal questions can affect a definitive determination by this Court, the Court may act without undue delay to protect important federal substantive rights.[93]

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[90]377 U.S. 386 (1964).

[91]377 U.S. at 389, n. 4.

[92]*Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

[93]To the same effect, *see Brady v. Maryland*, 373 U.S. 83 (1963) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The Court's approach to finality questions has been pragmatic and practical.[94] It has avoided generalizations and wooden results, and has focused instead on such questions as the substantiality of the federal questions involved, the likelihood that delay would seriously affect substantive rights, and the realities of whether controlling federal questions are sufficiently severable from the state law issues which will remain for decision.[95]

Tested against these pragmatic standards, Tornillo's technical claim of jurisdictional incompleteness lacks any plausible foundation. Recycling this case back into the state court system would not affect any issues now presented to the Court for review, and it certainly would not make the constitutional concerns disappear. If this Court does not hear this case, other legislatures may consider enactment of compulsory publication statutes.[96] The highest court in Florida has said that the compulsory publication statute is valid as applied to newspaper publishers. *The Herald* could win or lose its litigation with Tornillo on the facts, or conceivably on other issues of state law, but the statute will have been validated in Florida for all time until this Court changes that result. Thus, the only significant consequence

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[94] *See Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962); Hart & Wechsler, *The Federal Courts and The Federal System*, 628-29 (2nd ed. 1973); Stern & Gressman, *Supreme Court Practice*, 100 (4th ed. 1969).

[95] *E.g.*, *Local No. 438 Construction & General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963).

[96] A United States Senator has recently suggested the Congress consider a federal compulsory publication law if the Florida statute is not voided in this case. 120 Cong. Rec. 1105 (February 4, 1974).

of now finding a lack of finality is to postpone constitutional review for a later day when another case or controversy returns the identical issue to this Court. Not only would this produce "a completely unnecessary waste of time and energy,"[97] but given the "chilling effect" on First Amendment rights, such a result would be intolerable. Aside from criminal prosecutions under the statute which might be attempted, or private actions based on the Florida Supreme Court's analysis of the statute, the press will be operating under a cloud of doubt which can only produce chilling self-censorship.

A failure to act in this case will affect the statewide elections scheduled in Florida this year, where contests will be waged for Governor, United States Senator, and Justices of the Florida Supreme Court. Candidates must soon qualify for these and other elective offices.[98] Whether and to what extent the press elects to cover 1974 candidates and issues may well depend upon what this Court decides in this case.

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the Times principle . . . is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amend-

[97] *Mills v. Alabama, supra* at 217.

[98] Sections 99.061 and 100.31, Florida Statutes.

ment freedoms as fear of the outcome of the lawsuit itself. . . . *Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.* And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' "[99]

[99] *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (emphasis added).

## CONCLUSION

For the reasons given above, and for the reasons stated in the briefs of *amici curiae*, the judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted,

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